

Refugees and asylum seekers :
Australian experience and policy

Dr Christine A. Stevens

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Introduction

The government plans the annual number and composition of the settler intake admitted to Australia under our Migration and Humanitarian Programs. In recent years, the programs have been separated to try to ensure that a balance is achieved between the pursuit of Australian interests and our capacity to resettle people, and the costs that entails, as well as our humanitarian objectives and obligations.

Under the Humanitarian Program most people given protection in Australia have been selected for resettlement from other countries of first asylum or their home countries. Even though it has not traditionally seen itself as a country of first asylum, Australia is increasingly asked to give protection to people who seek asylum at the border or from within the country. While there is no right of asylum in international law and no right to remain in the country where asylum is sought, as a signatory to the 1951 United Nations Convention on the Status of Refugees and the 1967 Protocol, Australia is obliged not to return refugees to the countries where they fear, or have experienced, persecution. That obligation gives asylum seekers who reach Australia, and who are able to prove they meet the definition of a refugee, some moral entitlement to remain. The rise in the number of people applying for protection at the border, therefore presents considerable challenges to the state.

It has become increasingly difficult to draw clear distinctions between people who fear and flee persecution and therefore qualify for refugee status under the UN Convention, and the growing numbers who leave their home countries to escape wars, civil disruptions and natural disasters, who do not. Although Australia has expanded the categories of entry under the off-shore Humanitarian Program, to enable people to be selected for settlement who do not meet the UN definition of a refugee, there has been no relaxation of the requirement that people who seek asylum on-shore after arriving in Australia must satisfy the criteria for refugee recognition. However, some have been permitted to remain on humanitarian grounds in exceptional circumstances.

People are also increasingly leaving their home countries to escape deprivation and poverty and to seek economic opportunities and better lives. Readily available information about conditions in western developed countries acts as an inducement to move for people from less developed states, and comparatively cheap transport makes travel possible. Opportunities to migrate world-wide have not kept pace with demand, especially for people who lack skills and education. Given the pressures to move, many people have resorted to one of two options. They may enter and remain illegally in another country, or enter and claim refugee status. Fears have been expressed that many asylum seekers are essentially economic migrants who attempt to circumvent the normal immigration application procedures in their search for a better life. The

challenge that asylum seekers pose, have led many receiving states in Europe and North America to enact measures to defend themselves against asylum seekers who arrive without authorisation.

Asylum seekers challenge the plans made by the government to ensure that the costs of meeting humanitarian obligations do not outweigh the economic benefits of the migration program to Australia. As the numbers of asylum seekers have increased, their arrival has been seen as a threat to state sovereignty, for they undermine the integrity and control of the state's borders. They challenge the right of the state to determine who shall enter the country, and are seen as undermining the total immigration program, not only because of the threat they pose to the balance of costs and benefits, but also because they jeopardise the concept of the queue in which all aspiring immigrants and refugees must take their place. In 'jumping the queue outside Australia', on-shore asylum seekers threaten the long-term existence of the off-shore Humanitarian Program, as one of the original intentions when the program began in the 1970s was to prevent disorderly and unpredictable arrivals.

Table 1: Asylum applications lodged in Europe, North America and Australia, 1999-2001

Country	1999	2000	2001	Total
Austria	20,130	18,284	30,135	68,549
Belgium	35,777	42,691	24,549	103,017
France	30,833	38,588	47,263	116,684
Germany	95,331	78,764	88,363	262,458
Italy	33,000	15,564	9,620	58,184
Netherlands	39,300	43,892	32,579	115,771
Sweden	11,231	16,303	23,513	51,047
Switzerland	46,133	17,659	20,768	84,560
Canada	30,895	37,858	42,746	111,499
UK	91,200	98,900	*52,140	+242,240
USA	44,436	63,655	86,394	194,485
Australia	9,450	12,936	11,570	33,956

Source: UNHCR * nine month period only + incomplete data

With the exception of New Zealanders, all people wishing to come to Australia must obtain a visa. Visas for refugees and other humanitarian program entrants are only issued to people arriving under the off-shore selection and resettlement program. There is no visa category for people whose stated primary aim in coming to this country is to claim refugee status. They must either enter the country legally using a tourist, student or visitor visa and claim asylum after their arrival, or enter illegally without a visa and claim asylum at the border.

Those who apply for protection at the border have come to be regarded primarily as illegal immigrants, and only secondarily as asylum seekers. The illegality of their entry has become the primary factor in the way they are treated, rather than their need for protection. In the development and application of the concept of legality of entry, two streams of asylum seekers, and two streams of refugees have been created. There are marked differences in the treatment

given to the two groups of asylum seekers while claims for protection are examined, and to the two groups of refugees once decisions have been made in their favour.

Diminishing emphasis has been given to humanitarian obligations, and the needs and human rights of individual asylum seekers, and greater stress has been placed on the need to protect the sovereignty and integrity of the state from uncontrolled movements of people. As the government wishes to control immigration to ensure that it provides the greatest benefit to the Australian people and society, and does not simply provide benefits to the immigrant, restrictions on access to Australian territory have been progressively tightened, and active measures have been put in place to discourage potential unauthorised arrivals.

The migration program

The number of people accepted to immigrate to Australia is decided by the government each year, and most arrivals enter in the skill stream or the family stream. The planning for the year 2001-02, allowed for 85,000 entrants. Over 45 thousand of these came under the skill stream, and 38 thousand under the family stream.

Humanitarian program

Australia has operated off-shore selection and resettlement programs for refugees and displaced persons since 1947. The program has always operated with considerable flexibility, and resettlement has been offered to a wide range of people in need. Individuals have been accepted who comply with the United Nations definition of a refugee, as well as others who have had their status determined on a group basis. Many have arrived who have not experienced persecution according to the definition, or have not been outside their country of origin, but who suffered gross violations of their human rights, or who fled situations of violence and civil disorder, or suffered discrimination or hardship.

The number of places made available under the Humanitarian Program is also set each year, and for the year 2001-02, the total number of places allocated was 12 thousand. A similar number was made available the previous year 2000-01. Of that 12,000, approximately eight thousand were accepted for resettlement off-shore. Half of these places were reserved for refugees (defined under the UN Convention as subject to persecution in their home country), and half for people arriving under more flexible categories I have already mentioned. Approximately 4000 places were allocated for people who successfully claimed protection on-shore, i.e. successful asylum seekers.

On-shore asylum seekers

There are two categories of on-shore asylum seekers. Firstly, those who arrive legally on student, visitor or other temporary entry visas and claim protection after they arrive, and secondly, those who arrive unlawfully without a valid visa and seek protection at the border.

The number of people arriving without authorisation was fairly low throughout the 1990s, but there was an increase from 1998 onwards. Although air arrivals have generally outnumbered boat arrivals, the latter have been the principal focus of government, media and public attention. Until 1996-97 most boat arrivals came from Asia, but the number coming from the Middle East

steadily increased from the mid 1990s, and by 2000-01, 54 per cent came from Afghanistan, 24 per cent came from Iraq and 13 per cent were from Iran.

Table 2: Unauthorised arrivals by boat and air, Australia, 1994-95 to 2000-01

Year	Arrivals by boat	Arrivals by air	Total
1994-95	1,071	485	1,556
1995-96	589	663	1,252
1996-97	365	1,350	1,715
1997-98	157	1,550	1,707
1998-99	920	2,106	3,026
1999-00	4,175	1,695	5,870
2000-01	4,141	1,508	5,649

Source: Department of Immigration and Multicultural and Indigenous Affairs

Number of people who apply for protection

This table includes applications from people who arrived legally, as well as those who arrived without a visa. It shows data by financial year, unlike the UNHCR data, and also shows information back to 1994.

Table 3: On-shore applications for refugee status, 1994-95 to 2000-01

Year	Total applications
1994-95	6,943
1995-96	7,978
1996-97	11,133
1997-98	8,126
1998-99	8,371
1999-00	12,713
2000-01	13,015

Source: Department of Immigration and Multicultural and Indigenous Affairs

There was a big increase in applications for asylum in 1996/97, and a large proportion of these were made by people from the Philippines, Indonesia and China. In 1999/2000 there was another rise, and the majority of these applications came from people from the Middle East.

A high proportion of these Middle Eastern applicants were successful in their claims for protection, and their numbers and success prompted the government to institute a range of deterrence measures to try prevent their entry, limit their access to the refugee determination system, and to curtail the level of protection and benefits offered to those recognised as refugees. The government defended its actions by stating that it continued to meet its obligations to at least the minimum standard required by the Convention, but chose to be more generous to people who arrived legally rather than illegally.

Asylum seeking policy

I will outline briefly some of the changes that the government has made to immigration laws and regulations relating to asylum seekers since 1989. The changes have generally been made in response to particular crises and emergencies. They involve erecting barriers to prevent entry, restrictions surrounding the process of gaining entry once asylum seekers have arrived in the country, and limits placed on their integration into Australian society after entry.

(1) Barriers to entry

I have already mentioned that all foreign nationals except New Zealanders are required to have a visa to enter Australia. This measure was introduced in 1989. Other barriers to entry were put in place in the late 1990s in response to the increasing use of agents and people smugglers, by unauthorised arrivals. Then, as a result of the Tampa crisis in 2001, further changes were made to the laws. The navy was used to close the border against unauthorised arrivals by boat, to prevent them reaching Australian territory. Boats were driven away from Australian territorial waters, others were intercepted and the people on board were transported to islands in the Pacific. Legislation rushed through Parliament in September 2001 affirmed the legality of the government's actions. At the same time the government excised territories such as Christmas Island and Ashmore Reef, where most asylum seekers arrived by boat, and new legislation made it impossible for them to claim asylum from the excised areas.

The government has been criticised for the actions taken and the changes made to the laws. It is said that Australia has placed itself in debt to the Pacific countries that have taken the asylum seekers. It has failed to accept its obligations to process unauthorised arrivals and examine the claims of asylum seekers on its own territory. Nauru and PNG do not have the capacity to operate viable refugee determination systems, and Australia and the UNHCR have been required to undertake this for them. The Pacific Solution is an expensive short-term measure, which is proving to be unsustainable for very long. Proof of this, is the fact that the government announced in March 2002 that a new detention centre would be built at Christmas Island to process boat people on Australian soil. There is no certainty about the eventual destination of those who are found to be refugees, and those who are not, but negotiations have been held on the future of Afghan asylum seekers held in Nauru and PNG who have been found not to be refugees.

(2) The entry process

Asylum seekers must satisfy the UN criteria for refugee recognition in order to gain protection, and there has been no move to widen selection criteria. A refugee determination system was first established in 1978 in response to the arrival of boat people from Vietnam. It has been regularly modified over time and in 2002 consisted of a two-stage process. A single immigration department official made an assessment and decision on the merits of an application at the first stage. At the second stage the Refugee Review Tribunal made decisions on appeals against unfavourable decisions.

Limits on access to the refugee determination system

The number of people who were successful in their claims for refugee status rose after 1989, but was fairly steady from 1994-95 until 2000-01 when there was a marked rise. Their success has led the government to limit access to the refugee determination process. From mid 1994, an official from the immigration department held an additional preliminary interview with unauthorised arrivals when they were placed in detention, to determine their identity, and method and route of arrival. People were not asked if they wished to apply for refugee status, or if they wanted legal advice, and on the basis of the information given, a decision was made if the person was an asylum seeker. If the decision was negative, no assistance was given to help the individual lodge an application for a protection visa.

In the same year, people who had already gained refuge in 'safe third countries' were excluded from applying for protection in Australia. In 1999 people who had what is described as 'effective protection' in a third country were also denied access to the refugee determination system. Effective protection existed if the asylum seeker had the right to enter another country or live elsewhere. This applied to people who had lived for at least seven days in another country. The legislation was aimed at asylum seekers who had been given temporary protection in countries in the Middle East. One of the results of this legislation is the growing number of people who remain in Australia in detention indefinitely, because no readmission arrangements exist to allow their return to the country where they have effective protection.

Following the Tampa incident the government changed the law to prevent people transported to countries in the Pacific from coming to Australia under the off-shore Humanitarian Program, even if they were found to be refugees. These people cannot apply for visas if they have lived for a week in a country in which they could have obtained protection.

Table 4: Protection Visas granted to on-shore asylum seekers

Year	Permanent	Temporary	Total
1994-95	1,643	-	1,643
1995-96	1,926	-	1,926
1996-97	2,251	-	2,251
1997-98	1,588	-	1,588
1998-99	1,834	-	1,834
1999-00	1,584	874	2,458
2000-01	1,125	4,452	5,577

Source: Department of Immigration and Multicultural and Indigenous Affairs

Limits on access to the courts

The government has made several unsuccessful attempts to restrict asylum seekers access to the courts to have their claims reviewed. In 2001 grounds for appeal were restricted, and asylum seekers who arrived by boat at Christmas Island and Ashmore Reef were prevented from undertaking proceedings in all courts except the High Court. Critics have argued that all people in Australia should be entitled to have access to the courts so that decisions made by government officials affecting their rights may be reviewed.

Interpretation of the Convention definition

The government has also restricted its interpretation of the UN Convention definition of a refugee. This definition is open to wide interpretation, because the words 'well-founded fear' and 'persecuted' have various shades of meaning, and fear itself is subjective. From 1991 onwards, protection visas were issued to asylum seekers only if the Minister for Immigration was 'satisfied' that an applicant met the Convention definition of a refugee, not simply if the person met the requirements. Then following the Tampa incident in 2001 the definition of persecution was made even stricter. It is now required that persecution' should involve systematic and discriminatory conduct and serious harm, defined as: a threat to life or liberty; significant physical harassment or ill-treatment; significant economic hardship, denial of access to basic services or the capacity to earn a livelihood of any kind, all of which threaten the person's capacity to exist. Any conduct engaged in by an applicant in Australia is to be disregarded unless the person satisfies the Minister that this was not for the purpose of strengthening the claim for refugee status.

Detention policy

From 1989, people arriving in Australia without a valid visa were considered not to have entered the country, and authority was given for them to be placed under administrative detention until their claims to enter were assessed and found to justify entry. Not all unauthorised arrivals were detained, and distinctions were made on the basis of mode of transport to Australia. While air arrivals could be detained, and ship arrivals could be detained until their ship departed, boat arrivals were detained. The Act made no provisions for the removal of people who had arrived on boats that were destroyed after landing, and did not prescribe any mechanism for a detainee to obtain bail. No time limit was set on the period of detention, and this allowed unauthorised boat arrivals to be detained indefinitely.

In 1994 detention was made mandatory for all persons who were unlawfully in Australia, including those who had overstayed their visas or breached their visa conditions, either by working or by engaging in criminal activities. Detention was required until cases were determined, and visas granted or the person deported. However, people who enter the country legally on a visa and claim asylum after their arrival are not detained.

Australia is unique in having a mandatory detention policy for all unauthorised arrivals, and this is only possible because the numbers are quite low compared with the number of asylum seekers and illegal immigrants in Europe and North America. The UNHCR has stated that detention is permissible to verify identity, to determine the grounds on which the claim for refugee status is based, to deal with applications from asylum seekers who have destroyed their travel and identity documents, and to protect national security or public order.

The government has always maintained that its authority to detain derives from the principle of sovereignty. It is justified on the grounds that it prevents people entering illegally until their claims to enter are assessed. The government also says that it does not have a policy of detaining asylum seekers but that its right to detain unauthorised arrivals outweighs its humanitarian obligations to asylum seekers.

There has been considerable criticism of Australia's policy of mandatory detention being used as a means to deter other asylum seekers. According to Amnesty International people must not

be deterred or prevented from seeking refuge. Criticisms are also levelled at the length of time people have been detained, which may run into months or years, without effective control by the courts.

Detention centres

Until 1981 unauthorised arrivals were housed in unfenced migrant hostels in major state capitals, but in August of that year the first of the remote fenced and guarded centres was established at Port Headland. In 1999 other centres were opened at Curtin near Derby in Western Australia and Woomera in South Australia. More centres are planned for Port Augusta, Singleton in New South Wales and Darwin. However, the solutions found to the 'Tampa crisis' reduced the urgent need for more detention centres on the mainland.

Criticisms have also been made about conditions in detention centres and treatment of detainees. At times the centres have been overcrowded, with insufficient furniture, toilet and bathing facilities, inadequate medical and recreational facilities, or formal schooling for children and classes for adults. There were long periods when the centres were first opened when detainees had no access to mail services, telephones, faxes, radio or newspapers.

The management of the detention centres was privatised in 1997, with the contract awarded to a company that operated prisons. Under their management, segregation, solitary confinement, handcuffs, chemical restraints, random room searches and strip searches have been used as security measures. At times, newspapers, books and cassettes were confiscated. Instead of using names, staff addressed people by number, and at night guards made regular room checks, disturbing sleep with their noise and flashing torches. There were allegations of bashing, assaults and abuse of detainees at Woomera and elsewhere, and there has been much unrest within the detention centres, with mass escapes and riots. Water cannon and tear gas were used to quell disturbances at Woomera, during which armed detainees damaged property and set fire to buildings. There were many potential causes for the disturbances, with some reports of rioting after claims for refugee status were rejected, or advice was given of deportation, but the conditions in the centres and the indefinite length of detention were other factors.

The detained

People in detention include: unauthorised arrivals whose claims to enter have yet to be considered; asylum seekers whose claims for protection are under consideration; individuals whose claims for protection have been considered and rejected and who await removal from Australia; illegal immigrants who have overstayed their visas or breached their visa conditions by working or engaging in criminal activities; and illegal fishermen.

Table 5 shows the number of new people placed in detention from 1994-95 to 2000-01. It reveals that the total number of new detainees remained fairly constant each year until the end of the decade, when there was a sudden increase in the number detained. The rise was the result of changes to immigration regulations, and the increase in both the level of compliance activity against illegal immigrants, and the number of unauthorised arrivals.

Table 5: Admitted to detention centres

Year	Total number
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1994-95	1,697
1995-96	1,999
1996-97	2,460
1997-98	2,716
1998-99	3,572
1999-00	8,264
2000-01	7,881

Source: Department of Immigration and Multicultural and Indigenous Affairs

The overwhelming majority (over 80 per cent) of people detained are males aged between 18 and 50 years, but women and children are detained as well. For most of the 1990s less than 80 children were detained each year, but the number has risen, and over 1000 (1,147) children were detained in 2000-01. Fifty-two of the 155 children held in Woomera at the end of January 2001, were unaccompanied.

The UNHCR maintains that as a general rule unaccompanied minors should not be detained, but should be released into the care of family or child-care authorities, while children and their primary care-givers should not be detained unless this is the only means of maintaining family unity. Further the UNHCR suggests that children should not be held in prison-like conditions and their education should take place outside the place of detention. The government has ignored UNHCR guidelines, as men, women and children are detained together in the centres. Last year the Commonwealth Ombudsman found that women, and children in particular, were at risk in the detention environment. There were reports of sexual abuse by other detainees against women and children in the Woomera centre, and an inquiry found there were serious shortcomings in the reporting of child sexual abuse claims by detention centre management.

(3) After entry

Most people granted on-shore asylum have been given permanent protection, but there is no right to this in international law, which only provides that an individual should be protected until it is safe to return home. In 1999 the government changed the law to allow variation in the length of protection according to legality of entry. People who arrived lawfully on a visa and were successful in their claims for refugee status were given permanent protection, while unauthorised arrivals whose claims for refugee status were recognised, were given Temporary Protection Visas (TPV), valid for three years.

The changes aimed to reduce the benefits that acted as inducements to unauthorised asylum seekers, and encouraged people smuggling. TPV holders could apply for permanent protection shortly before their temporary visa expired, if repatriation was not possible at that time.

In September 2001 further changes were made in response to the 'Tampa crisis'. Unauthorised arrivals who have lived in another country for at least seven days after leaving their home country, where they could have been given 'effective protection', are now only eligible for temporary protection for three-years. The visa can be renewed, and their need for protection is determined at each renewal, but they can never be granted permanent protection. Temporary protection is also only available to refugees accepted by Australia from countries in the Pacific,

and to any existing TPV holder who arrived in Australia since 1999, who had not lodged an application for permanent protection before the law was changed.

These changes have created two classes of refugees, as the different visas confer different access to benefits. Unlike other refugees, TPV holders have no automatic right of return if they choose to leave Australia, and no right to family reunion. However, they can work, they have access to health care and counselling services, and are eligible to receive basic income support in the form of Special Benefit. But they cannot not receive any other income supports or job search assistance, which are available to refugees arriving under the off-shore Humanitarian Program, and to permanent protection visa holders. They are also denied access to settlement services such as English language tuition, temporary housing, and household formation assistance in the form of household goods, all of which are available to other refugees.

The government maintained that in all cases it meets 'its full obligations to refugees to at least a minimum standard required by the Convention', but that 'for people who play by the rules, it has chosen to be more generous than it is obliged'. The government also stated that the more generous benefits were made available to people who settle permanently, and were not needed by those given temporary residence. But many of these people will be permanent temporary residents.

Conclusion

The number of people who seek asylum in Australia is small by world standards, but, like many other developed countries, we have enacted a number of defensive measures to protect ourselves against asylum seekers. However, it is possible to create a more humane regime.

The length of time people are held in detention could be reduced, and the detention environment could be modified so that people are not held in harsh prison-like conditions. It is also possible for women and children to be released, based on the success of the trial at Woomera involving 25 women and children who lived in the local community while their male relatives remained in the centre.

Alternatives to detention have been proposed. One of these involves what is called 'open detention', whereby accommodation and daily needs are provided by the Department of Immigration, but asylum seekers are permitted to leave the detention centre during the day. Another suggestion has been for 'Community Release' whereby a person lives at a designated address with a family member or in accommodation provided by a community organization. A bond would be posted and people would be required to report regularly to the Department of Immigration.

The government has rejected alternative methods of dealing with asylum seekers that do not involve detention, on the grounds that a high proportion would disappear while applications were processed, or if an unfavourable decision was made. Without an identity card system, it is said it would be difficult to trace those who disappear. However, asylum seekers who arrive on a visa are permitted to remain in the community while their applications are considered.

Successful on-shore asylum seekers, who arrive without a visa, and whose claims for refugee status are recognised, are counted as part of the total Humanitarian Program intake, but they are not accorded the treatment given refugees who arrive under the off-shore resettlement

program. Temporary protection means that people are left in perpetual limbo, unable to recommence their lives, and denied access to welfare and education services and family reunion

The government considers that it continues to meet its core obligations under the UN Convention, and rejects the notion of moral rights or entitlement to remain for asylum seekers who make claims for protection at the border. The system Australia has established grants more favourable treatment to those with the means to arrive legally, and less favoured treatment to those whose needs for protection may be as legitimate, but who arrive illegally. The system is designed to maximise Australia's self-interest and minimise obligations to certain groups of asylum seekers, and to provide protection primarily to the state, and only secondarily to asylum seekers.

Acknowledgement

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Contact Details

Dr Christine Stevens
stevcorp@ozemail.com.au